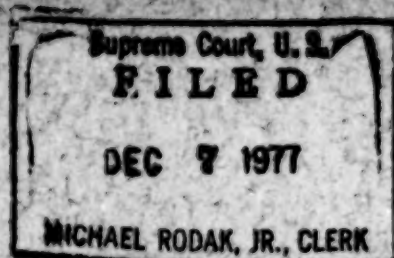


No. 77-716



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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**MAX CLELAND, ADMINISTRATOR OF THE VETERANS  
ADMINISTRATION, ET AL., APPELLANTS**

**v.**

**NATIONAL COLLEGE OF BUSINESS**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH DAKOTA**

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**SUPPLEMENTAL MEMORANDUM FOR THE APPELLANTS**

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**WADE H. MCCREE, JR.,  
Solicitor General,  
Department of Justice,  
Washington, D.C. 20530.**

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Since the filing of appellants' jurisdictional statement, legislation has been adopted which modifies both the 85-15 requirement and the two-year rule that are at issue in this case. On November 23, 1977, the President signed Pub. L. 95-202, the GI Bill Improvement Act of 1977 (H.R. 8701, 95th Cong., 1st Sess.). See 13 Weekly Comp. of Pres. Doc. 1802. The pertinent portions of the Act are included as Appendix A, *infra*.

Section 305(a)(1)(B) of the new Act authorizes the Administrator to waive the two-year rule as applied to branches or extensions of educational institutions pursuant to 38 U.S.C. (Supp. V) 1789(c), as added by Section 509 of Pub. L. 94-502, 90 Stat. 2401, "in whole or in part, if the Administrator determines, pursuant to regulations

which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government."<sup>1</sup>

Section 305(a) of the new Act modifies the 85-15 requirement in several respects. First, Section 305(a)(2)(B) exempts any institution in which veterans' enrollment is no more than 35 percent of total enrollment from course-by-course computation of the 85-15 requirement, except that if the Administrator has cause to believe that veterans' enrollment in a particular course exceeds 85 percent of total enrollment for that course, the Administrator may enforce the requirement as to that course. Second, Section 305(a)(3) requires the Administrator to conduct a study regarding the need for computing the percentage of students receiving grants from all federal sources and the problems in making such computations; it further provides that students receiving federal grants from sources other than the Veterans Administration shall not be included in the 85 percent quota until six months after the completion of this study and "until such time as the Administrator shall determine \* \* \* that there is an adequate and feasible system for making such computations and that it is desirable and necessary to make such computations \* \* \*."<sup>2</sup>

<sup>1</sup>Section 305(a)(1)(A) also permits the Administrator to waive, in whole or in part, the requirements of 38 U.S.C. (Supp. V) 1789(b)(6), as added by Section 509 of Pub. L. 94-502, 90 Stat. 2401, which exempts from the two-year rule courses offered by educational institutions under contract with the Department of Defense if certain requirements are met.

<sup>2</sup>Section 501 of the Act states that, with certain exceptions, the Act is to be effective on the first day of the first month beginning 60 days after the date of enactment, i.e., on February 1, 1978. Pursuant to an exception in Section 501, Section 305(a)(3) became effective on the date of enactment, November 23, 1977.

Since the new Act modifies both provisions that the district court held unconstitutional, it may be appropriate for the Court to vacate the judgment below and remand the case for consideration of the effect of these amendments. However, if the case is remanded, for the reasons stated in the jurisdictional statement (J.S. 7-10), the district court should be directed to sustain the constitutionality of these statutes if it finds that they have a reasonable basis.<sup>3</sup>

Respectfully submitted.

WADE H. MCCREE, JR.,  
*Solicitor General.*

DECEMBER 1977.

<sup>3</sup>As noted in appellants' jurisdictional statement, the district court concluded even prior to the 1977 amendments that the provisions in question had a rational basis, but it applied a more demanding standard and found the statutes unconstitutionally overbroad. Nothing in the 1977 amendments affects the selection of the standard of review or undermines the district court's finding of a rational basis. To the contrary, the amendments narrow the sweep of both the two-year rule and the 85-15 requirement and thereby more precisely tailor those provisions to meet the particular evils they are intended to remedy.

## **APPENDIX A**

The GI Bill Improvement Act of 1977, Pub. L. 95-202, H.R. 8701, 95th Cong., 1st Sess. (1977), provides in pertinent part:

SEC. 305. (a)(1) Section 1789 of title 38, United States Code, is amended by—

(A) inserting at the end of subsection (b) immediately below clause (6) the following new sentence:

"The Administrator may waive the requirements of clause (6) of this subsection, in whole or in part, if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government."; and

(B) adding at the end of subsection (c) the following new sentence: "The Administrator may waive the requirements of this subsection, in whole or in part, if the Administrator determines, pursuant to regulations which the Administrator shall prescribe, it to be in the interest of the eligible veteran and the Federal Government."

(2) Section 1673(d) of title 38, United States Code, is amended by—

(A) inserting in the second sentence a comma and "pursuant to regulations which the Administrator shall prescribe," after "determines"; and

(B) inserting at the end thereof the following new sentences: "The provisions of this subsection shall not apply to any course offered by an educational institution if the total number of veterans and persons receiving assistance under



this chapter or chapter 31, 32, 35, or 36 of this title who are enrolled in such institution equals 35 per centum or less, or such other per centum as the Administrator prescribes in regulations, of the total student enrollment at such institution (computed separately for the main campus and any branch or extension of such institution), except that the Administrator may apply the provisions of this subsection with respect to any course in which the Administrator has reason to believe that the enrollment of such veterans and persons may be in excess of 85 per centum of the total student enrollment in such course.”

(3) The Administrator of Veterans' Affairs, in consultation with other appropriate departments and agencies, shall conduct a study to examine the need for computing, under section 1673(d) of title 38, United States Code, the percentage of those students enrolled in courses at educational institutions who are in receipt of grants from any Federal department or agency, and the problems of such institutions in making such latter computations, and shall, not later than September 30, 1978, submit a report to the Congress indicating whether such computations are needed and prescribing in detail an adequate system for making such computations. Until the expiration of six months after the date of submission of such report and until such time as the Administrator shall determine, based on such report, that there is an adequate and feasible system for making such computations and that it is desirable and necessary to make such computations, the Administrator shall not apply the provisions contained in section 1673(d) of title 38, United States Code, requiring educational

institutions in determining compliance with such subsection to compute the numbers of students in receipt of Federal grants other than from the Veterans' Administration.

\* \* \* \* \*

SEC. 501. The provisions of this Act shall become effective on the first day of the first month beginning 60 days after the date of enactment of this Act, except that the provisions of title I and section 304(a)(1) (A) shall be effective retroactively to October 1, 1977, the provisions of sections 201 and 202 shall become effective on January 1, 1978, the provisions of section 203 shall be effective retroactively to May 31, 1976, and the provisions of sections 301, 302(2), 304(a)(1) (B), 304(a)(2), 305(a)(3), 305(b)(2), 305(b)(3), 305(b)(4), 305(c), 306, 307, 308, 309, and 310 and of title IV shall be effective upon enactment.